

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. **CV 10-8840-VBF(AGRx)**

Dated: **May 13, 2011**

Title: **Preston Smith -v- City of Burbank, et al.**

PRESENT: HONORABLE VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Joseph Remigio
Courtroom Deputy

None Present
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

ATTORNEYS PRESENT FOR DEFENDANTS:

None Present

None Present

PROCEEDINGS (IN CHAMBERS):

**COURT ORDER RE DEFENDANT GUNN'S MOTION
FOR JUDGMENT ON THE PLEADINGS (DKT.
#21)**

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. **Accordingly, the hearing set for May 16, 2011 at 1:30 p.m. is vacated and the matter taken off calendar.**

I. RULING

The Court has received, read, and considered Defendant Gunn's Motion for Judgment on the Pleadings (dkt. #21); Plaintiff's Preston Smith's Opposition (dkt. #27); and Defendant's Reply (dkt. #28).

For reasons described more fully below, the Court rules as follows:

(1) DENIES the Motion for Judgment on the Pleadings as to Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983. Defendant has not sufficiently shown that Plaintiff's First Cause of Action is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

(2) DENIES the Motion for Judgment on the Pleadings as to Plaintiff's Second Cause of Action for Violation of California Civil Code § 52.1,

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Third Cause of Action for Intentional Infliction of Emotional Distress and Fourth Cause of Action for Assault and Battery. As Defendant has not sufficiently shown that Plaintiff's Section 1983 cause of action is barred by the *Heck* doctrine, Defendant has also not shown that Plaintiff's state law causes of action are barred. *Yount v. City of Sacramento*, 43 Cal. 4th 885 (2009).

II. BACKGROUND

Plaintiff Preston Smith alleges that on April 10, 2009, Plaintiff and other individuals were being questioned by officers from the Burbank Police Department as they were walking in the vicinity of a liquor store in Burbank. Compl. ¶ 16 (dkt. #1). Plaintiff alleges that, after being questioned by Officer Gunn, he was "tasered" in his lower back by Officer Gunn, causing Plaintiff to fall on the ground and become immobilized. *Id.* ¶ 17. "While lying immobilized on the ground, face down, Plaintiff verbally surrendered and told Defendant Gunn 'OK, you've got me.' Plaintiff remained face down on the ground and did not attempt to move or to stand up, at which time Defendant Gunn 'tasered' him and second and third time, causing Plaintiff to have convulsions." *Id.* Plaintiff alleges that Defendant then tasered him three additional times. *Id.* ¶¶ 17-18. Plaintiff does not dispute the lawfulness of his arrest, nor does he dispute that he resisted arrest. However, Plaintiff alleges that Officer Gunn used excessive force as Plaintiff was being restrained and placed in handcuffs. *Id.*

On April 14, 2009, a four-count misdemeanor complaint was filed against Plaintiff in the Los Angeles Superior Court. See Defendant Gunn's Request for Judicial Notice¹ ("RJN"), Ex. A (dkt. #23). Count II of the complaint alleged that Plaintiff "did willfully and unlawfully resist, delay or obstruct a public officer discharging or attempting to discharge any duty of his office or employment," a violation of California Penal Code § 148(a)(1). *Id.* It alleged that Plaintiff committed the following acts of resistance: (1) Plaintiff ran from Officer Gunn during a lawful detention and despite orders to stop; (2) Plaintiff used elbows and hands in a fist to strike Officers Baumgarten, Edwards, Joel, Rodriguez and Gunn during the Officers' attempt to lawfully restrain Plaintiff; (3) Plaintiff flailed arms and kicked legs when Officers Baumgarten, Edwards, Joel, Rodriguez and Gunn tried to detain him. *Id.* at 1-2.

¹ The Court GRANTS Defendant's Request for Judicial Notice (dkt. #23) of Exhibits A-D. See Fed. R. Evid. 201(b).

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On April 29, 2009, Plaintiff pled guilty to violating Count II of the complaint - California Penal Code § 148(a)(1). See Ex. A (Criminal Complaint); Ex. C (Misdemeanor Advisement of Rights, Waiver, and Plea Form), Ex. D (Criminal Transcript). Plaintiff signed a document entitled "Misdemeanor Advisement of Rights, Waiver, and Plea Form", which acknowledges the guilty plea. See RJN, Ex. C. Plaintiff's plea was approved by the Court. See RJN, Ex. B (Sentencing Memorandum); Ex. D (Criminal Transcript).

In this action, Plaintiff alleges four causes of action against Defendants City of Burbank, Burbank Police Department and Burbank Police Officers Baumgarten, Edwards and Gunn: (1) Violation of 42 U.S.C. § 1983; (2) Violation of California Civil Code § 52.1; (3) Intentional Infliction of Emotional Distress; and (4) Assault and Battery (dkt. #1).

III. ANALYSIS

A. Legal Standard

Fed. R. Civ. P. 12(c) provides that "[a]fter the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings." "Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990). As explained more fully below, the Court finds that the Motion does not show that this standard has been met.

B. First Cause of Action: Violation of 42 U.S.C. § 1983

The Court **DENIES** Defendant Gunn's Motion for Judgment on the Pleadings as to Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983.

When a plaintiff who has been convicted of a crime under state law seeks damages in a § 1983 suit, "the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). "But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed *Id.*"

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In this case, Plaintiff pled guilty to a violation of California Penal Code § 148(a)(1). Section 148(a)(1) provides: "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment, . . . shall be [guilty of a misdemeanor]." For a conviction under § 148(a)(1) to be valid, the defendant must have "resist[ed], delay[ed], or obstructed[ed]" a police officer in the lawful exercise of his or her duties. The lawfulness of the officer's conduct is an essential element of the offense under § 148(a)(1). See *People v. Curtis*, 70 Cal.2d 347, 354-56 (1969) ("an officer may only use reasonable force to make an arrest or to overcome resistance").

Plaintiff alleges that, after being questioned by Defendant Gunn, Plaintiff was tasered in his lower back by Defendant Gunn, "causing Plaintiff to fall to the ground and become immobilized. While lying immobilized on the ground, face down, Plaintiff verbally surrendered and told Defendant Gunn 'OK, you've got me.' Plaintiff remained face down on the ground and did not attempt to move or to stand up, at which time Defendant Gunn 'tasered' him and second and third time, causing Plaintiff to have convulsions." Compl. ¶ 17. Plaintiff alleges that Defendant then tasered him three additional times. *Id.* ¶¶ 17-18.

To find that on the face of the Complaint, no material issue of fact remains to be resolved, *Hal Roach Studios, Inc.*, 896 F.2d at 1550, Defendant would need to show that he used reasonable force in arresting Plaintiff or in overcoming Plaintiff's resistance. *People*, 70 Cal.2d at 354-56. The test for whether force is reasonable or excessive is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Cooper*, 490 U.S. 386, 397 (1989).

The Court finds that Defendant has not sufficiently shown that his actions were objectively reasonable, such that no material issue of fact remains to be resolved. See *Hooper v. County of San Diego*, 629 F.3d 1127, 1133 (9th Cir. 2011) ("[W]e conclude that a conviction under California Penal Code § 148(a)(1) does not bar a § 1983 claim for excessive force under *Heck* when the conviction and the § 1983 claim are based on different actions during 'one continuous transaction.'"). Defendant has not provided adequate authority or evidence showing that he did not use excessive force in arresting Plaintiff or in overcoming Plaintiff's resistance. A holding that the use of the taser was excessive force would not "negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of [Plaintiff's] attempt to resist it" *Yount v. City of Sacramento*, 43 Cal. 4th 885, 899 (2009) (internal citations and quotations omitted).

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Accordingly, the Court **DENIES** Defendant Gunn's Motion for Judgment on the Pleadings as to Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983.

C. Second Cause of Action: Violation of California Civil Code § 52.1; Third Cause of Action: Intentional Infliction of Emotional Distress; Fourth Cause of Action: Assault and Battery

Defendant contends that Plaintiff's state law claims are also barred by his conviction for violation § 148(a)(1), as the California Supreme Court has applied the *Heck* principle to claims brought under California law. *Yount*, 43 Cal. 4th at 902 ("[W]e cannot think of a reason to distinguish between section 1983 and a state tort claim arising from the same alleged misconduct").

However, as Defendant has not sufficiently shown that the *Heck* doctrine bars Plaintiff's First Cause of Action for Violation of 42 U.S.C. § 1983, the Court finds that Defendant has also not shown that Plaintiff's state law claims are barred.

Accordingly, the Court **DENIES** Defendant Gunn's Motion for Judgment on the Pleadings as to Plaintiff's Second Cause of Action for Violation of California Civil Code § 52.1, Third Cause of Action for Intentional Infliction of Emotional Distress, and Fourth Cause of Action for Assault and Battery.

IT IS SO ORDERED.

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UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

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MINUTES (IN CHAMBERS): ORDER by Judge Valerie Baker Fairbank: denying [21] Motion for Judgment on the Pleadings. (kbr)

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